221822

BEFORE THE SURFACE TRANSPORTATION BOARD
395 E STREET, S.W.
WASHINGTON, D.C. 20423-0001

COMMON CARRIER OBLIGATION OF RAILROADS — TRANSPORTATION OF HAZARDOUS MATERIALS	STB Ex Parte No 677 (Sub-No. 1)

COMMENTS OF THE
PEOPLE OF THE STATE OF CALIFORNIA
AND THE
CALIFORNIA PUBLIC UTILITIES COMMISSION

FRANK R. LINDH
JASON ZELLER
PATRICK S. BERDGE

Attorneys for the People of the State of California and the California Public Utilities Commission

505 Van Ness Avenue, Rm. 4300-G
San Francisco, CA 94102
Phone (415) 703-1519
Fax (415) 703-4432

July 10, 2008

#337923

I. INTRODUCTION

On June 23, 2008, the Surface Transportation Board ("Board") of the United States Department of Transportation ("U S D O.T.") served a decision announcing that the Board would hold a public hearing at 9:00 a m on Wednesday, July 16, 2008, at its headquarters in Washington, DC, for the purpose of examining issues related to the common carrier obligation of railroads with respect to the transportation of hazardous materials Written testimony from interested parties is due on July 10, 2008.

The California Public Utilities Commission ("Commission") regulates the safety of railroad operations in its State and Federal capacity. Since the Dunsmuir and Seacliff, California, toxic spill, the State of California and the Commission have been concerned with the transportation of hazardous materials by rail throughout the State. In 1994, the Commission issued *Southern Pacific Transportation Co*., Decision (D.)94-12-001, 57 CPUC 2d 386 concerning these two hazardous materials releases In 1997, the Commission issued *Re Mitigation of Local Rail Safety Hazards Within California*, D 97-09-045, 75 CPUC 2d 1. In 2003, the Ninth Circuit Court of Appeals upheld the Commission's authority to regulate railroad safety in those areas in which the Federal Railroad Administration had not acted *Union Pac R R Co v Cal PUC*, 346 F.3d 851 (9th Cir. 2003). However, the State and the Commission's jurisdiction does not extend to the transportation of hazardous materials by rail. *Union Pac R R Co v Cal PUC*, *supra*, 346 F.3d at 858 n4

Nevertheless, California has been the site of repeated hazardous materials spills by railroads over the last twenty years. The Cajon Pass runaway and toxic spill resulted in damages of approximately 250 million dollars.[1] Because of California's location it is the starting point for general freight off-boarded by ships at the Port of Long Beach/Los Angeles, which receives more freight containers than any other Port in the United States,

---

[1] On February 1, 1996, the Burlington Northern Santa Fe runaway at the Cajon Pass killed two crewmembers with estimated damages of $250 million

and transferred to railroad cars routed to points throughout the United States. Included in those trains are rail and tank cars carrying hazardous materials such as gases defined as "poisonous by inhalation," under 49 C.F R Part 171.8, and designated as Toxic Inhalation Hazards ("TIH") (49 C.F.R. 107.601 (a) (3))

II. BACKGROUND

In its Notice of February 27, 2008, the Board noted that the common carrier obligation refers to the statutory duty of railroads to provide "transportation or service on reasonable request." 49 U.S C. 11101(a) "A railroad may not refuse to provide service merely because to do so would be inconvenient or unprofitable *G S Roofing Prods Co v Surface Transp Bd*, 143 F.3d 387. 391 (8th Cir 1998)" 73 F R. 10509 However, the Board also noted that the common carrier obligation is not absolute.[2] See 49 U.S.C. 11101(a).

> In recent years, the Board has seen an increasing number of questions arising, both formally and informally, regarding the extent of a railroad's common carrier obligation. As a result, this hearing seeks to highlight the importance of the common carrier obligation, to provide a better understanding of it, and to assist the Board in its monitoring and compliance work.
>
> 73 F R 10509, 10510.

The Board noted that the hearing would include the following issues.

(1) Service limitation resulting from a capacity constrained environment;

(2) cost and safety issues related to the transportation of hazardous materials, especially toxic inhalation hazards;

(3) carrier-imposed requirements for infrastructure investments by shippers,

(4) the impact of volume requirements or incentives,

---

[2] A railroad common carrier may relieve itself of its common carrier obligation by issuing an "embargo" An embargo is "an emergency measure placed in effect because of some disability on the part of the carrier which makes the latter unable properly to perform its duty as a common carrier" *G S Roofing Prods Co v Surface Transp Bd*, *supra*, at 392 It is generally a temporary measure

(5) economically motivated service reductions and metering of the demand for service,

(6) the proper use of rail embargoes;

(7) when it becomes necessary to obtain abandonment authorization; and

(8) to whom does the common carrier obligation apply; and

(9) the role of the Board's Office of Compliance and Consumer Assistance in ensuring that carriers meet their common carrier obligation.

More particularly, the Board specified the general issue of liability in the investigation in this docketed proceeding

> That hearing raised many issues involving the obligation of railroads to haul hazardous materials, including toxic by inhalation hazards (TIH) For many hazardous materials, including TIH, rail is the safest and most efficient mode of transportation But, according to the railroads, the transportation of these materials subjects them to ruinous liability in the event of an accident To allow a more detailed discussion, the Board is holding a hearing to explore the issues surrounding the transportation of hazardous materials by rail
>
> The Board is interested in specific potential policy solutions to the liability issue, including solutions modeled on the Price-Anderson Act of 1957. The Price-Anderson Act was designed to ensure that adequate funds would be available to satisfy liability claims of members of the public for personal injury and property damage in the event of a catastrophic nuclear accident. Parties may also comment on the appropriate role of the Board in developing such a policy solution. The Board is also interested in the wide range of views from all stakeholders, including any diversity of views from similarly situated companies or groups
>
> STB June 4, 2008 Notice, 2008 STB LEXIS 314

The State of California and the Commission respectfully submit these comments addressing the second issue, "cost and safety issues related to the transportation of

hazardous materials, especially toxic inhalation hazards [emphasis added]." See 73 F R. at p 10510

III. DISCUSSION

As noted by the Board, railroads have a common carrier obligation to transport hazardous materials *G S Roofing Prods Co v Surface Transp Bd, supra* That obligation is not absolute for the reasons stated by the Board. See 73 F.R. 10510, supra.

A. The Board's Hazardous Materials Order in Its Union Pacific Railroad and the Southern Pacific Transportation Company Merger Decision, 1 S.T.B. 233 (Aug. 12, 1996)

In its decision concerning the merger of the Union Pacific Railroad and the Southern Pacific Transportation Company, the S T B ordered certain environmental mitigating conditions (Finance Docket No. 32760) In paragraph 65 of 1 S T.B 233, 1996 STB LEXIS 220 (August 12, 1996), the Board ordered.

> UP/SP shall transport all hazardous materials in compliance with U S Department of Transportation Hazardous Materials Regulations (49 CFR parts 171 to 180). UP/SP shall provide, upon request, local emergency management organizations with copies of all applicable Emergency Response Plans and participate in the training of local emergency staff for coordinated responses to incidents In the case of a hazardous material incident, UP/SP shall follow appropriate emergency response procedures contained in its Emergency Response Plans.
>
> 1 S.T.B. 233, 1996 STB LEXIS 220, 763.

B. The Pipeline and Hazardous Materials Administration's Interim Final Rule on the Routing of Hazardous Materials By Rail

On April 16, 2008, the U S D.O.T. and the U S Department of Homeland Security ("D H S ") issued an Interim Final Rule ("Rule") concerning the routing of railroad trains containing certain hazardous materials (49 C.F R 172 et seq). While that Rule provides that railroads shall select the safest and most secure route for the transportation of TIH. *Hazardous Materials Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments*, (Docket No. PHMSA-RSPA—2004—18730 RIN 2137-AE02), 73

F.R 20752 (April 16, 2008). However, qualifying that reasonable requirement is U S.D.O.T.'s provision that this "safest and most secure route" must also be "commercially practicable." *Id.* at p 20760 As the State and the Commission noted in its comments to the Pipeline and Hazardous Materials Safety Administration ("PHMSA"), submitted May 15, 2008,

> U S D.O T 's failure to consider the overall cost in damages to locations of high population density, of environmental significance and value, as well as iconic buildings and landmarks, from damage from the release of hazardous materials (even those selected by U S D O.T.) skews the economic analysis from the start. While it may be reasonable to exclude routes over which railroads have no authority to operate [73 F R 20752 at 20761], it is neither reasonable nor prudent to begin the analysis by making costs to railroads and shippers the ultimate determinant, i.e , excluding the overall costs and damages to the nation and its population in general.
>
> California and Commission Comments at p. 9

U.S.D O.T. further qualifies the safety and security evaluation or assessment to be made by the railroad by rejecting any "alternative route [which] would significantly increase a carrier's operating costs, as well as the costs to its customers ." *Id.* at 20760 – 20761

C. The Railroads Have a Substantial Liability for Carrying Hazardous Materials Including Toxic Inhalation Hazards

As previously mentioned, California has had railroad toxic spills with damage costs as high as 250 million dollars This liability indeed may be huge if a railroad were to release plutonium with a half-life of 24,000 years[1] Further, liability for hazardous

---

[1] "There are 15 isotopes of plutonium Some isotopes of plutonium are fissionable the atomic nucleus is unstable and will split apart, resulting in the release of large amounts of energy Pu-239 and Pu-241 are the most abundant fissionable isotopes of plutonium. Pu-239 has a half-life of 24,000 years, and Pu-241's half-life is 14 4 years Plutonium-244, which occurs naturally, has the longest half-life· 80,000,000 years " Further, "In general plutonium isotopic mixtures that are commonly encountered in the nuclear fuel cycle, nuclear weapons programs, or thermoelectric generator applications exhibit much higher radiological toxicity than chemical toxicity."U S Nuclear Regulatory Commission, *Fact Sheet on Plutonium*, http //www nrc gov/reading-rm/doc-collections/fact-sheets/plutonium html

materials—that could poison primary water sources for states and regions in the country— also could be substantial. In its comments to PHMSA in its May 15, 2008, PHMSA-RSPA—2004—18730 RIN 2137-AE02, California and the Commission stated:

> The western United States generally has less average yearly rainfall than other parts of the country The scarcity of water leads to a greater dependency on primary water sources than in other areas of the country. Furthermore, the West is dependent to a greater extent on annual snowpack to store and deliver fresh water to its residents. This in turn results in vulnerable points at the headwaters of an essential California water source where an accidental spill, or intentional terrorist attack, could potentially contaminate that primary water source, catastrophically affecting most Californians.
>
> For instance, if the fresh water produced from the Sierra snowmelt is contaminated by a spill of hazardous materials before it gets to the California Delta or the California Central Valley Water Project, a majority of Californians could be severely harmed. "Two-thirds of California's population (more than 20 million people) gets at least part of its drinking water from the Delta " Delta Subsistence in California, U.S. Geological Survey, FS-005-00, April 2000, at p 2 The Cantara Loop is located at one such vulnerable headwater. It lies north of Shasta Lake, north of the City of Sacramento, and, of course, north of the California Delta, all of which provides fresh water to 20 million Californians
>
> The cost of choosing an alternative hazardous materials route to the Union Pacific Railroad's Shasta—Black Butte mainline to the Upper Sacramento River, or the Feather River mainline to the Sacramento River, would be very cost-effective when viewed in light of significant damage to the total water resources of California's Upper Sacramento River, Lake Oroville, and the Delta. Significant contamination to the California Delta water supply would threaten the delivery of clean water to 40 percent of California households.

Clearly, the cost of remediation of 40 percent of all of California's clean water would likely be disastrous to a railroad, if remediation were possible at all

D. California and the Commission Support the Creation of a Fund To Ensure That Railroads May Meet Their Liability For Personal Injury, Property Damages, and Environmental Remediation in the Event of a Catastrophic Hazardous Materials, TIH, or Nuclear Accident With Financial Conditions

Because the potential damages of a catastrophic hazardous materials, TIH, or nuclear accident could be beyond the financial means of even the largest U S railroad, the State and Commission support the creation of an industry fund for catastrophic rail accidents that cannot be met by current financial resources of a railroad corporation. Unlike the Price-Anderson Act of 1957[4], the fund should be broadened to include hazardous materials releases other than nuclear that pose a significant threat to the environment and public safety. Further, the fund should differ from the Price-Anderson Act of 1957 by requiring that the rail industry remain liable for its negligence in the transportation of hazardous materials The State and the Commission recommend that the railroad continue to be held liable under the fund for such damages as caused by the railroad's own negligence, at least to the extent their resources allow them to meet these damage costs while continuing to meet their reasonable obligations and debts. The fund would serve only to prevent a railroad from being forced to liquidate its assets to meet its liability for a catastrophic hazardous materials accident.

IV. CONCLUSION

The selection of the safest routes for the transportation by rail of hazardous materials, including radioactive materials and TIH, is absolutely essential for the health and safety of this nation. The basic route analysis proposed by U.S.D.O.T.'s PHMSA provides a valuable and necessary tool in reducing serious injury and damages from certain hazardous materials releases (explosives, Class 7 radioactive material, CDC regulated agents and toxins, and TIH) Unfortunately, the Rule does not require rerouting if the alternative route is not "practicable" economically for the railroad rather than the

---

[4] 42 U S C §§ 2210 et seq.

nation and its citizens. The test of practicability applies solely to the railroads' economics; there is no attempt to balance the costs to the railroads against the potential costs to the nation in general. Consequently, the Rule fails to protect the nation's resources or population adequately as it is presently written

To provide safe rail transportation of hazardous materials, U S D.O.T. (1) must ensure that the safest railroad routes are selected in the transportation of hazardous materials, especially radioactive materials and TIH, (2) must weigh the potential environmental damages, damages to critical natural resources, and injuries in densely populated areas, in determining the safest railroad routes which likely would result in the selection of alternative rail routes that avoid environmentally sensitive areas, natural resources such as critical headwaters, and densely populated urban areas, and (3) should attempt to ensure that railroads meet their liability for the release of hazardous materials, especially radioactive materials and TIH, through the creation of an industry fund to pay for personal injury and property damages in the event of a catastrophic hazardous materials, TIH, or nuclear accident, that the railroad cannot meet with its own financial resources

Respectfully submitted,

FRANK R LINDH
JASON ZELLER
PATRICK S BERDGE

By: PATRICK S. BERDGE

Patrick S Berdge
Attorneys for the People of the State of California and the California Public Utilities Commission

505 Van Ness Avenue, Rm. 4300-G
San Francisco, CA 94102
Phone: (415) 703-1519
Fax (415) 703-4432

July 10, 2008

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document entitled **COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION in STB Ex Parte No. 677 (Sub-No. 1)**, upon the Surface Transportation Board in this proceeding by electronically forwarding the document in Microsoft WORD and/or PDF filling out and submitting the Document Submission Form to the STB's electronic docket site at: http://www.stb.dot.gov

Dated at San Francisco, California, this 10th day of July, 2008.

/s/ NANCY SALYER

Nancy Salyer